

1 THE HONORABLE JOHN C. COUGHENOUR
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC.,

Plaintiff,

v.

KASPERSKY LAB, INC.,

Defendant.

No. C07-0807 JCC

PLAINTIFF ZANGO'S MOTION FOR
TEMPORARY RESTRAINING ORDER

I. RELIEF REQUESTED

Plaintiff Zango, Inc. ("Zango") is a Bellevue-based company that provides content to its customers via the Internet. On May 21, 2007, Zango learned that an anti-virus program manufactured and distributed by Kaspersky Lab, Inc. ("Kaspersky") is blocking users from downloading Zango's products, and damaging and interfering with the use of Zango software and products by existing Zango customers. In addition, Kaspersky's application has been damaging Zango's website in such a way that users are prevented from downloading Zango products since early March. There is no justification for Kaspersky's attack on Zango's products. Richard Purcell – a world-renowned independent computer privacy expert – has

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1 conducted an exhaustive review of Zango's products and policies and pronounced them to be
 2 benign. *See* Declaration of Richard Purcell (hereinafter "Purcell Decl.").

3 Kaspersky's extensive, ongoing and irreversible attack on Zango warrants immediate
 4 injunctive relief. Here are some of the irreparable consequences Zango will continue to suffer
 5 absent injunctive relief:

- 6 • Kaspersky prevents Zango from reaching potential customers by blocking
 7 computer users who attempt to download and install Zango products from
 8 doing so without providing an opportunity for the user to consent to download.
- 9 • Zango customers who already have Zango products on their computers are
 10 unable to access Zango content. Accordingly, when these customers are
 11 unable to access their Zango programs after the installation of Kaspersky
 12 software, they unfairly (but understandably) blame Zango for the programs'
 13 disappearance. As a result, Kasperksy's product causes Zango to lose existing
 14 customers (and their goodwill) on daily basis.
- 15 • Because Zango does not collect personal identifying information from its
 16 customers, customers that Zango loses due to Kaspersky's attack are lost
 17 forever; similarly, Zango has no means of contacting its customers and
 18 warning them of the attack. For this reason, Kaspersky isn't just irrevocably
 19 erasing Zango products from users' computers, it is also irrevocably erasing
 20 hard-earned customers from the rolls of Zango's customer lists.
- 21 • Kaspersky software also disables Zango's website in such a manner that when
 22 a user opens the website in his or her internet browser, Kaspersky
 23 automatically deletes links to download Zango products without providing
 24 notice to the user. Thus, again potential future customers are prevented from
 25 accessing Zango's products, irrespective of their desire to do so.

Given these uncontested facts, there is no question that Zango will prevail in the
 claims set forth in the Complaint it quickly filed after learning of Kaspersky's misconduct.
 As a result of the widespread distribution of Kaspersky software, Zango is suffering massive
 irreparable harm to its business model and reputation ***right now***, and without quick

1 intervention by this Court, Zango will continue to suffer irreversible harm that will never
2 adequately be compensated at law. Accordingly, Zango seeks a temporary restraining order
3 compelling Kaspersky to immediately remove Zango's software programs from its programs
4 and its detection database, and to send an update to its existing customers.

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6 II. STATEMENT OF FACTS

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8 Zango is an online media company based in Bellevue, Washington that provides
9 consumers free access to a large catalog of online videos, games, music, tools and utilities.
10 Zango's catalog of content is offered to customers free of charge and is sponsored by
11 advertising that customers agree to view as a condition of using the products. Zango also
12 offers a premium version of its software that gives consumers access to Zango's content
13 catalog without advertising.

14 Zango takes extensive precautions to ensure that every Zango customer affirmatively
15 and knowingly consents to download, installation and continued usage of Zango software. An
16 independent audit conducted by Richard Purcell, CEO of Corporate Privacy Group, and
17 released on May 7, 2007, concluded that Zango is fully compliant with all reasonable and
18 recommended privacy requirements, and, in particular that Zango's privacy program ensures:
19 (1) user notification of the program or application's existence; (2) user consent to the
20 download or installation of the program or application; and (3) user control of the program or
21 application. *See* Purcell Decl., Ex. B. As a result of Zango's commitment to protecting the
22 privacy of its customers, Zango can be certain, and Mr. Purcell has verified, that all users who
23 have installed Zango's applications or products since January 1, 2006 have done so
24 consensually.

1 Kaspersky is in the business of developing and marketing various computer protection
2 and security software programs, including anti-virus protection. Kaspersky markets and
3 distributes computer protection and security software programs under its own name, and also
4 sells such programs to distributors and other original equipment manufacturers ("OEMs").
5 One such program is "Kaspersky Anti-Virus" or "KAV." Kaspersky utilizes KAV in its own
6 computer program, called "Kaspersky Internet Security" ("KIS"), and sells KAV to OEMs.
7 According to their website, Kaspersky has at least 50 and as many as 150 such OEM
8 customers, including industry leaders such as PC Tools, Checkpoint, and AOL.

9

10 **A. Kaspersky's software damages Zango's website and prevents users from
11 downloading Zango products from Zango's website.**

12 On March 8, 2007, Zango's testing lab discovered that KIS was damaging a Zango
13 website named "seekmo.com" by removing Zango weblinks from computers running the KIS
14 program. Essentially, when a user running KIS on their computer accessed the seekmo.com
15 website, KIS automatically and without notice to the user scanned the webpage and removed
16 all links that would allow the user to download Zango products from the webpage. Further
17 tests revealed that KIS was damaging and removing promotional links hosted by Zango
18 publishers as well.

19

20 Zango contacted Kaspersky on March 9, 2007, regarding the damage being done by
21 KIS. On March 12, 2007, Kaspersky admitted that KIS was damaging Zango's website and
22 requested time to fix the issue. Testing performed by Zango's lab on March 14, 2007 showed
23 that KIS was no longer damaging Zango's webpage.

1 However, on March 21, 2007, Zango's lab discovered that similar damage (i.e.,
 2 missing web links) was being caused by at least two OEM customers of Kaspersky's anti-
 3 virus application KAV, i.e., the same technology utilized in KIS. Zango was able to resolve
 4 the issue with one of these OEMs by notifying it of the problem; the other OEM refused to
 5 take any action. Zango also contacted Kaspersky directly and requested that Kaspersky issue
 6 an update to its OEM customers of KAV immediately in order to correct the problem. As of
 7 this date, Kaspersky has not done so, and Zango's website continues to be damaged by OEM
 8 customers of Kaspersky, preventing users from downloading Zango products.

10 **B. Kaspersky's program and software disables Zango's programs from the**
 11 **computers of Zango customers, and prevents users from downloading Zango**
 12 **products.**

13 On May 21, 2007, Zango testing of KIS version 6.0.2.621 revealed that, in addition to
 14 damaging Zango's website, Kaspersky software blocks installation of Zango software, and
 15 also directly attacks and disables Zango products already installed on a user's computer.
 16 First, a user who has KIS enabled is unable to download and install Zango products. Zango is
 17 thus prevented from reaching potential customers. Moreover, in the course of blocking
 18 installation of Zango's software, KIS identifies Zango products as "malicious" and as an
 19 "infection," although Kaspersky knows full well that this is a false and misleading
 20 description.

21 Second if KIS is enabled on a computer that already has Zango products downloaded
 22 and installed, KIS damages Zango's application in such a manner that Zango users are unable
 23 to access Zango's content, i.e., the videos, games, etc. that Zango provides in exchange for the
 24 user's agreement to view targeted advertising. In addition, every time Zango software
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1 attempts to deliver a targeted ad, KIS opens a window prompting the user to click either
 2 “Allow” or “Deny.” Even if the user clicks “Always Allow,” KIS continues to require the
 3 user to choose “Allow each time.” Users are thus left with a computing experience consisting
 4 of endlessly being required to click “Allow” in order to continue browsing the Internet, while
 5 being prevented from accessing the Zango content that they wanted access to in the first
 6 place. It is not difficult to see that this experience will turn users against Zango.

7 Although Zango has requested that Kaspersky remedy this situation, and issue an
 8 update to its OEMs, as of this date Kaspersky has taken no action to remedy the ongoing
 9 damage. Accordingly, Zango filed the Complaint in this matter on May 22, 2007, and
 10 provided Kaspersky with notice of intent to seek a temporary restraining order from the ex
 11 parte department of the King County Superior Court on May 24, 2007.

14 **III. STATEMENT OF ISSUES**

15 Whether the Court should enter a temporary restraining order compelling defendant
 16 Kaspersky to immediately remove Zango’s software programs from its programs and its
 17 detection database, and to send an update to its existing customers.

18 **IV. EVIDENCE RELIED UPON**

19 Zango relies upon the Declarations of Robert Purcell, Gregg Berretta, Steven Fogg
 20 and the exhibits attached therein.

22 **V. AUTHORITY**

23 **A. Legal Standard**

24 In determining whether to issue a temporary restraining order or preliminary
 25 injunction, federal courts in the Ninth Circuit consider: (1) the likelihood of success on the

1 merits, (2) the possibility that the plaintiff will suffer irreparable injury without injunctive
 2 relief, (3) the extent to which the “balance of hardships” favors the plaintiff, and (4) whether
 3 injunctive relief would advance the public interest (in certain cases). *Los Angeles Mem'l*
 4 *Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980); *Del Toro-*
 5 *Chacon v. Chertoff*, 431 F. Supp. 2d 1135, 1140 (W.D. Wash. 2006). *See also Citizens*
 6 *Alliance to Protect our Wetlands v. Wynn*, 908 F. Supp. 825, 829 (W.D. Wash. 1995) (the
 7 standard for preliminary injunctions also applies to temporary restraining orders). “The
 8 analysis is often compressed into a single continuum where the required showing of merit
 9 varies inversely with the showing of irreparable harm.” *Del Toro-Chacon*, 431 F. Supp. 2d at
 10 1140. Therefore, the movant may satisfy its burden “by demonstrating either (1) a
 11 combination of probable success on the merits and the possibility of irreparable injury or (2)
 12 that serious questions are raised and the balance of hardships tips sharply in its favor.” *Los*
 13 *Angeles Mem'l Coliseum*, 634 F.2d at 1201. As will be demonstrated, Zango satisfies these
 14 requirements.

17 **B. Zango is Likely to Succeed on the Merits.**

18 Zango’s first cause of action against Kaspersky, intentional interference with Zango’s
 19 contractual relations or business expectancy, requires the following elements:

20 (1) the existence of a valid contractual relationship or business expectancy;
 21 (2) that the defendant had knowledge of that relationship; (3) an intentional
 22 interference inducing or causing a breach or termination of the relationship or
 23 expectancy; (4) that defendant interfered for an improper purpose or used
 24 improper means; and (5) resultant damage.

1 *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997)

2 (internal citations omitted).¹

3 The likelihood that Zango will prevail on this cause of action is overwhelming. Zango
 4 has a valid contractual relationship with its existing customers and a valid business
 5 expectancy in future customers of Zango products. *See Newton Ins. Agency & Brokerage,*
 6 *Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (“A valid
 7 business expectancy includes any prospective contractual or business relationship that would
 8 be of pecuniary value.”). Kaspersky clearly had knowledge of the relationship between
 9 Zango and its customers as well as Zango’s prospective business prospects and equally clearly
 10 purposefully interfered with those relations and prospects by damaging Zango’s software and
 11 by preventing future customers from being able to install Zango software. *See id.*
 12 (“Interference with a business expectancy is intentional ‘if the actor desires to bring it about
 13 or if he knows that the interference is certain or substantially certain to occur as a result of his
 14 action.’”) (quoting Restatement (Second) Of Torts § 766B cmt. d). Moreover, Kaspersky
 15 interfered for an improper purpose – advancement of its own commercial interests at Zango’s
 16 expense – and its bad faith is evident by its continuing refusal to remedy the ongoing damage
 17 being inflicted on Zango. Finally, the resultant damage to Zango is self-evident: Kaspersky’s
 18 actions have caused and continue to cause substantial financial damage by severing the
 19 relationship between Zango and its current and potential future customers (in addition to the
 20 damage Zango is suffering to its reputation and business model).

24
 25 ¹ Federal courts apply state tort law in diversity cases. *Estate of Domingo v. Republic of Philippines*, 694 F. Supp. 782, 785 (W.D. Wash. 1988).

1 Zango is very likely to prevail on its second cause of action against Kaspersky as well.

2 Liability for trade libel attaches where a defendant: (1) publishes false and disparaging
 3 statements concerning the quality of the plaintiff's product; (2) does so with the intent that
 4 such publication results in harm to the pecuniary interest of the plaintiff, or either recognizes
 5 or should recognize that such harm is likely; and (3) does so with actual malice (i.e., either
 6 knows that the statement is false or acts in reckless disregard of its truth or falsity).

7 Restatement (Second of Torts) § 623A; *see also Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 820
 8 (9th Cir. 1995) (assuming that Washington recognizes trade libel based on Washington Court
 9 of Appeals decision citing Restatement § 623A for the proposition that plaintiffs seeking
 10 damages in disparagement face a higher burden of proof than those seeking damages in
 11 defamation). Here, Kaspersky has labeled, and continues to label, Zango's products as an
 12 "infection," as "malicious." Labeling Zango products in this manner is likely to mislead
 13 customers into believing that Zango applications are attempting to damage their computers or
 14 somehow compromise their privacy, which, as Kaspersky knows, is not the case. Zango has
 15 worked hard to achieve a good reputation in the marketplace, and to foster relationships with
 16 customers, content-providers, and distribution channels. Kaspersky's baseless attacks on
 17 Zango's products threaten all that Zango has worked to achieve.

18 Zango will likewise be able to establish its cause of action under the Washington
 19 Consumer Protection Act ("CPA"). A plaintiff makes a *prima facie* showing of a CPA
 20 violation when it shows (1) an unfair or deceptive act; (2) in trade or commerce; (3) impacting
 21 the public interest; (4) injuring Plaintiff in its business or property; and (5) causation.

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 25 *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531

PLAINTIFF ZANGO'S MOTION FOR TEMPORARY
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1 (1986). Kaspersky specifically markets itself as a purveyor of security software that protects
 2 consumers from so-called “malware.” Kaspersky’s unfair and deceptive conduct thus has a
 3 public interest impact, and its conduct has clearly injured and will continue to injure
 4 Plaintiff’s business, reputation, and goodwill.

5 **C. Kaspersky’s Conduct Has Caused, and Will Continue to Cause, Irreparable
 6 Injury to Zango.**

7 Courts routinely recognize that significant loss of customers or business goodwill and
 8 damage to business reputation may constitute substantial or irreparable harm justifying
 9 injunctive relief. *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable
 10 Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (“[W]hen the failure to grant preliminary
 11 relief creates the possibility of permanent loss of customers to a competitor or the loss of
 12 goodwill, the irreparable injury prong is satisfied.”); *K-Mart Corp. v. Oriental Plaza, Inc.*,
 13 875 F.2d 907, 915 (1st Cir. 1989) (“[H]arm to goodwill, like harm to reputation, is the type of
 14 harm not readily measurable or fully compensable in damages -- and for that reason, more
 15 likely to be found ‘irreparable.’”); *Ginorio v. Gomez*, 301 F. Supp. 2d 122, 134 (D.P.R. 2004)
 16 (plaintiffs sought an injunction to stop the defendant from revoking their insurance licenses;
 17 court found that plaintiff had established irreparable injury where evidence showed that the
 18 “the insurance business is one based on trust and . . . the revocation of plaintiffs licenses, even
 19 if temporary, would result in unmeasurable harm to plaintiffs’ reputation[,]” and that plaintiffs
 20 “existing clients and any potential new ones would have to take their business elsewhere.”).

21 Here, as a result of Kaspersky’s conduct, Zango has suffered damages to its customer
 22 base, its reputation, and its business model. In addition to the direct financial damages being
 23

1 inflicted by Kaspersky, Zango faces the ongoing prospect of permanent loss of customers to
 2 competitors in the marketplace, loss of goodwill, and damage to its reputation. These are not
 3 losses that are easily recouped or which may be cured solely by recovery of money damages.
 4

5 **D. The Balance of Hardships Tips in Zango's Favor.**

6 The balance of hardships favors relief to Zango. Zango will suffer—in fact, it is
 7 already suffering—incalculable harm if the temporary restraining order is not granted. Day
 8 by day, Zango is losing its customers and suffering damage to its goodwill and reputation.
 9 Conversely, the relief requested by Zango asks very little of Kaspersky, and would have no
 10 effect on its existing customer base or future customers. Given the significant ongoing
 11 damages being suffered by Zango, and the ease with which Kaspersky may remedy the
 12 situation, balancing of the equities favors granting the present motion.

13 **VI. CONCLUSION**

14 The purpose of a temporary restraining order is to preserve the status quo and prevent
 15 irreparable harm pending further court proceedings. *Granny Goose Foods, Inc. v. Bhd. of*
 16 *Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). That is all that Zango seeks
 17 here. Zango is likely to succeed on the merits, and it has already suffered irreparable injury
 18 (and will continue to do so). The balance of hardships tips sharply in Zango's favor. For the
 19 foregoing reasons, this Court should issue a temporary restraining order, and ultimately a
 20 preliminary injunction, compelling Kaspersky to remove Zango's software programs from its
 21 programs and detection database, and to send an update to its existing customers.

1 DATED this 29th day of May, 2007.
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PLAINTIFF ZANGO'S MOTION FOR TEMPORARY
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Plaintiff Zango, Inc. herein.

I hereby certify that on May 29, 2007, I electronically filed the attached foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following persons:

Bruce E.H. Johnson
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

and I hereby certify that I have delivered via U.S. Mail the document to the following non CM/ECF participants:

N/A

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29 day of May, 2007, at Seattle, Washington.


Joyce Abraham

PLAINTIFF ZANGO'S MOTION FOR TEMPORARY
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